

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUMBERTO LOZANO VALDOBINOS,

Defendant.

CASE NO. CR04-145C

ORDER

This matter comes before the Court as a result of a limited remand of the Ninth Circuit Court of Appeals (Memorandum, No. 04-30411), ordered on October 21, 2005 pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc) and *United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional *Booker* error—see *United States v. Booker*, 125 S. Ct. 738 (2005)).

In accord with the limited remand procedures adopted in *Ameline*, the parties have submitted supplemental pleadings addressing the sole question of whether the Court's sentencing decision would have been "materially different" had the Court known that the Sentencing Guidelines were advisory. 409 F.3d at 1079. The burden of proof is on Defendant to prove the positive of the stated proposition, and the Court assumes that the burden is by a preponderance of the evidence.

1 On review of the aforementioned supplemental pleadings, the presentence investigation and
2 report, the original sentencing memoranda, the transcript of the sentencing hearing, the judgment, and the
3 file and events of the entire proceeding, including the sentences of codefendants, the Court finds and rules
4 as follows.

5 Defendant Humberto Lozano Valdobinos originally was indicted on one count of conspiracy to
6 distribute over one kilogram of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and
7 one count of distribution of heroin over one kilogram. Conviction of these charges would have triggered
8 a 120-month mandatory minimum sentence. 21 U.S.C. § 841(b)(1)(A). Pursuant to a plea agreement,
9 however, Defendant ultimately pled guilty to distribution of heroin as charged in a superseding indictment
10 (Dkt. No. 57), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). The charge to which Defendant pled
11 guilty carries a 60-month mandatory minimum sentence. 21 U.S.C. § 841(b)(1)(B). The base level for
12 this offense is 32. A 3-point reduction adjustment was agreed to by the parties for acceptance of
13 responsibility, resulting in a total offense level of 29.

14 Defendant's criminal history includes a 2000 misdemeanor assault (1 criminal history point) and a
15 2003 misdemeanor DUI/criminal attempt/driving (1 criminal history point). As a result, Defendant's
16 criminal history guideline category would have been III. Defendant argued at his September 24, 2004
17 sentencing that his criminal history should be reduced to category I. This Court acknowledged that his
18 criminal history was "overstated" at category III, but declined to reduce it to category I. Accordingly,
19 the Court found that criminal history category II was appropriate. (Sentencing Transcript (Dkt. No. 130)
20 5). This determination resulted in a sentencing guideline range of 97 to 121 months. Category III would
21 have resulted in a range of 108 to 135 months, while the category I range is 87 to 108 months.

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1 Probation recommended a sentence of 121 months; the Government recommended 108 months;
2 and Defendant recommended 87 months (hoping for a reduction to category I). This Court imposed a
3 period of confinement of 97 months and a period of supervised release of four years, finding the
4 justification for the sentence as that set forth in the presentence report together with the category II
5 criminal history category finding.

6 This Court is required to “impose a sentence sufficient, but not greater than necessary” to
7 accomplish the following: (1) reflect the seriousness of the offense, promote respect for the law, and
8 provide just punishment for the offense; (2) afford adequate deterrence to criminal conduct; (3) protect
9 the public from further crimes of the defendant; and (4) provide the defendant with needed educational or
10 vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C.
11 § 3553(a). In addition to the foregoing, § 3553(a) sets forth a number of other factors that the Court
12 shall consider, including the nature and circumstances of the offense, the history and characteristics of the
13 defendant, the kinds of sentences available and the sentencing range, the need to avoid unwarranted
14 sentence disparities, and the need to provide restitution to victims. *Id.* That the guidelines are but one of
15 several factors after *Booker* does not mean that they are irrelevant. Further, a sentence may be entirely
16 reasonable either within or outside the guideline range.

17 On the facts of this case, the Court finds that a sentence of 97 months is reasonable, as well as
18 “sufficient, but not greater than necessary” to meet the dictates of § 3553. Defendant conspired to
19 distribute over one kilogram of heroin, and his 97-month sentence is well below the 120-month
20 mandatory minimum for conviction of such an offense. Further, during sentencing, the Court made an
21 adjustment to Defendant’s criminal history category to eliminate the disproportionate impact of a
22 category III sentencing range. However, the Court declined to reduce Defendant’s criminal history
23 below category II, which maintained the minimum at 97 months. Upon review of the record in light of
24 the factors set forth in § 3553, the Court finds that the sentence imposed would *not* have been materially
25 different had the Court known at the time of Defendant’s sentencing that the Sentencing Guidelines were

1 advisory and not mandatory. Accordingly, Defendant's request for resentencing is DENIED.

2 SO ORDERED this 9th day of March, 2006.

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5 John C. Coughenour

6 United States District Judge